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No. 09-259

Supreme Court, U.S.
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In The

Supreme Court of the United States

METRO LIGHTS, L.L.C.,
a New York limited liability company,

Petitioner,

v.

CITY OF LOS ANGELES,
a California municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this case, which involves facts virtually identical to those in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), tread any new ground that justifies reexamining *Metromedia*?

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STATEMENT OF THE CASE

Factual Background

The City of Los Angeles has a long history of placing advertising signs on public bus benches. Formal agreements granting a private company the right to place such signs on bus benches in exchange for payment to the City began at least as early as 1987, and it would be reasonable to assume that the practice had been common for many decades before that, although formal records of it that early no longer exist. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 902 (9th Cir. 2009).

In 2001, after a public bidding process, the City entered into the most recent of those agreements, the "Coordinated Street Furniture Agreement" with CBS (then known as Viacom Decaux LLC). Two dozen parties submitted bids through this process, but the plaintiff in this case, Metro Lights, was not among them. *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927, 932 (C.D. Cal. 2006). Under that agreement, CBS was required to install new bus shelters and make annual payments to the City. The agreement gave CBS exclusive advertising rights on the new public facilities. *Metro Lights*, 551 F.3d at 902.

The City also has a long history of regulating billboards within its borders. For many years, the City had in place time, place and manner regulations for commercial signage in the City. Los Angeles Ordinance No. 173681 (Appendix, App. 1-6). This

regulatory scheme allowed private parties to apply for permits to erect billboards but restricted their size, height, and location.

Over time, it became apparent to the City that these time, place and manner regulations were not adequately controlling the proliferation of billboards in the City. Los Angeles Ordinance No. 173681 (Appendix, App. 1). To address that problem, in December of 2002, the City enacted a ban on all new billboards on private property in the City. Los Angeles Ordinance No. 174547 (Appendix, App. 8-15).

This case concerns a city's right to place advertising signs on its own bus shelters,[1] which are the modern version of bus benches. Metro Lights is alleging that by doing this the City of Los Angeles has undermined the effectiveness of its ban on new billboards[2] so that it violates the First Amendment.

Around December 2003, Metro Lights installed a number of signs on private property in violation of

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[1] The term "bus shelters" will be used in this brief to collectively refer to covered bus benches and other street furniture such as informational kiosks and automated public toilets.

[2] The term "billboard" will be used in this brief to refer to all "offsite commercial signs." Generally speaking, offsite commercial signs advertise goods and services available elsewhere than the site where the sign is located. By contrast, onsite commercial signs advertise goods and services available at the same site where the sign is located.

the ban, the City's response to which was to issue citations. *Id.*

On February 17, 2004, Metro Lights filed suit.

Opinions Below

On January 23, 2007, the district court below invalidated the City's ban on new billboards. That ruling was based on the district court's conclusion that a de facto exception for bus shelter advertising worked at "cross purposes" with the ban causing it to fail this Court's *Central Hudson*[3] test for regulation of commercial speech. *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927 (C.D. Cal. 2006).

The district court alluded to an economic motive for the City to enact the ban but the district court made no finding that this was the City's true or sole motivation for enacting the ban. Nor did Metro Lights introduce evidence to this effect at the district court level so as to challenge the ban's stated purposes under the second element of the *Central Hudson* test.

On January 6, 2009, the Ninth Circuit reversed. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 909 (9th Cir. 2009). The Ninth Circuit explained that in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), this Court had upheld twelve express exceptions to a

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[3] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

city-wide ban on new billboards, including an exception for "bus bench signs." After recognizing that this exception for bus bench signs was "virtually identical" to Los Angeles' de facto exception for bus shelter signs, under stare decisis the Ninth Circuit followed *Metromedia* and upheld Los Angeles' ban. *Metro Lights*, 551 F.3d at 908.

In upholding the exception for bus shelter signs, the Ninth Circuit relied on the same two primary grounds on which the decision in *Metromedia* rests. The first is recognition that a ban on billboards will continue to satisfy the "direct advancement" element of the *Central Hudson*[4] test even where a city carves out an exception for certain signs, such as onsite signs or, here, for bus shelter signs. *Id.* at 511. Bus shelter signs, being inherently limited in number and size, pose no threat of undermining a ban on billboards

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[4] The *Central Hudson* test is an intermediate scrutiny test developed by this Court that strikes a careful balance between giving the government sufficient latitude to regulate commercial speech and adequately protecting commercial speech. Altering the *Central Hudson* test to provide even more protection to commercial speech will upset this careful balance and turn the test into strict scrutiny or something much closer to it. Such stricter scrutiny should be reserved for political and other noncommercial speech that occupies the highest rung of protection on the First Amendment hierarchy. This Court has already recognized that the great danger of doing this is that it will dilute the protection enjoyed by noncommercial speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978).

to the point that it no longer directly advances the government's goals.

The second ground in *Metromedia* that the Ninth Circuit relied on was deference to local land use decisions dealing with signage. *Metromedia* gives a generous amount of deference to cities to decide how to implement local bans on billboards, and an exception for bus shelter signs – which are part of a limited and coordinated public transportation system – qualifies for such deference. *Metro Lights*, 551 F.3d at 908.

The Ninth Circuit panel unanimously voted to deny Metro Lights' request for a rehearing. A request for en banc hearing was also denied.

REASONS FOR DENYING THE PETITION

The practice of this Court has been to allow certiorari only in limited circumstances. None of those circumstances is present in this case and therefore the petition should not be granted.

There is no conflict among the circuits on the legal issue in this case that would justify certiorari. Attempting to manufacture such a conflict, Metro Lights points out that a few circuit courts have questioned whether this Court issued any controlling opinions regarding the regulation of noncommercial speech in *Metromedia*. But Metro Lights fails to identify any controlling opinion made by the *Metromedia* Court over which the circuits are now split,

and which would now justify certiorari. Also, even if there were a conflict over a noncommercial speech issue, that would be irrelevant to the strictly commercial speech issue at play in the instant case. Thus, there is no conflict among the circuits on a legal issue that would justify certiorari.

Because stare decisis required the Ninth Circuit to follow *Metromedia*, Metro Lights' real beef is with that case. But a challenge to *Metromedia* through the instant case is unwarranted for many reasons. First, the instant case treads no new ground making it necessary to revisit *Metromedia*. Second, during the nearly thirty years since *Metromedia* was handed down, this Court has always declined to revisit the decision. Third, overturning *Metromedia* would undo three decades of jurisprudence that has carefully balanced the respective rights of sign companies, local government, and the public. Fourth, despite Metro Lights' claim that the *Metromedia* decision was so splintered that it gave no "binding decision," the truth is that a clear majority of the *Metromedia* Court (composed of a four-Justice plurality and Justice Steven's express joinder with the plurality's commercial speech ruling) did hand down a firm ruling upholding local bans of new billboards, which has been relied on by scores of courts, including the Ninth Circuit here in *Metro Lights*.

Metro Lights argues that this Court's application of the *Central Hudson* test in non-billboard arenas signals a sea change in this Court's application of the *Central Hudson* test that warrants overturning

Metromedia. It does not. The *Central Hudson* test has always been fluid – allowing courts the flexibility to determine whether in any given set of facts a specific regulatory scheme actually furthers the government's interests. Merely because this Court has seen fit to invalidate some regulatory schemes that are wholly futile, does not doom all regulation to the same fate.

Metro Lights also urges this Court to take the case because the economic incentive for the City to impose a ban has not been properly considered. Untrue. The district court made no finding that the City's true or sole motivation for enacting the ban was to generate revenue for the City's own bus shelter signs. Moreover, Metro Lights could have introduced evidence to this effect at the district court level and thereby challenged the ban's stated purposes under the second element of the *Central Hudson* test, but did not. Metro Lights having bypassed that opportunity, this Court should not now infer a motive of which there was no proof or finding below.

Finally, the distinction between public and private property provides an alternative basis for upholding the Ninth Circuit's decision.

For all these reasons, the petition should be denied.

A. There is no conflict among the circuits justifying granting the petition.

A long standing ground for certiorari is the existence of a conflict among the circuits on a specific

legal issue. There is no such conflict among the circuits on the specific legal issue at the heart of the instant case, which is whether a de facto exception to a city's ban on billboards causes the ban to violate the First Amendment. The instant case is thus far the only circuit decision on this issue.

In an attempt to somehow show a conflict among the circuits, Metro Lights points to a few circuit cases where those courts have questioned what it is that this Court said in *Metromedia*.[5] But this questioning is just that, questioning. Metro Lights fails to identify a controlling opinion that was made by the *Metromedia* Court over which those circuits are now split.

Just as significantly, the cases cited by Metro Lights to support this point do not even deal with the commercial speech legal issue central to this case. Instead, these cases deal with *Metromedia's* ruling concerning regulation of noncommercial speech. *See Sotlantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1260 (11th Cir. 2005), "however, both the four-Justice plurality opinion written by Justice White and the two-Justice concurrence written by Justice Brennan concluded that the ordinance's regulation of noncommercial advertising was unconstitutional – although for wholly different reasons."); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994);[6]

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[5] Petition at 11-16.

[6] Metro Lights notes that in *Rappa* the Third Circuit found the *Metromedia* Court's analysis wanting and for that reason

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Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464 (6th Cir. 1991) (speaking of both *Rappa* and *Discovery Network*, the *Sotlantic* court commented: "Indeed, at least two of our sister Circuits have applied Marks[7] analysis to Metromedia's noncommercial-speech holding and have found no controlling opinion." [the court then cited to *Rappa* and *Discovery Network* as the two "sister Circuits."]). Because these cases deal with noncommercial speech issues, they are irrelevant to the commercial speech issue in the instant case, and thus there is no conflict between those cases and the present one.

"crafted its own First Amendment analysis." (Petition at 12). However, it is telling that in the fifteen years since *Rappa* was handed down no other circuit has adopted the *Rappa* test while scores of courts have continued to follow *Metromedia*.

[7] To determine if a controlling opinion exists, the *O'Dell/Marks* doctrine says that the holding of a majority of the Court can be viewed as that position that reflects the narrowest grounds for agreement among the five Justices that comprise the majority. If no grounds for agreement can be found, there is no majority opinion and no opinion of the Court. *O'Dell v. Netherland*, 521 U.S. 151, 160, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997); *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

B. There is no reason to revisit *Metromedia v. City of San Diego*, which for the past thirty years has served as the bedrock for countless sign cases decided by the lower courts.

There is no valid reason for this Court to revisit *Metromedia*, which has been the leading case on the subject of a ban on billboards for nearly three decades. During that time, scores of lower courts have relied on the case and, by doing so, built a principled line of jurisprudence concerning the regulation of commercial signs. Overturning *Metromedia* is unnecessary and would lead to more, not less, chaos in this area of the law.

As explained above, all the Ninth Circuit did here was comply with stare decisis and follow *Metromedia*, in which this Court issued a directly-on-point ruling upholding a ban on new billboards in spite of an express exception for bus benches. The relevant facts in *Metromedia* and in *Metro Lights* are virtually identical. Both involve city-wide bans on new billboards, and both involve exceptions for advertising signs on city-owned bus benches or their modern equivalent. Because the cases are so similar, *Metro Lights* breaks no new ground and is just another example of a lower court following the well established law laid down in *Metromedia*. No other case has warranted revisiting *Metromedia* in nearly thirty years and this case is no different.

Not only has this Court declined to revisit *Metromedia* during nearly thirty years, this Court, in fact, expressly reaffirmed the case in 1984 in *Members of The City Council of The City of Los Angeles v. Taxpayers for Vincent,*[8] (which involved the defendant here, City of Los Angeles) and, again, in 1994, in *City of Ladue v. Gilleo.*[9] The continuing viability of *Metromedia* has also been recognized by the circuit courts, including the Ninth Circuit in *Ackerley v. Communications of the Northwest Inc. Krochalis*, 108 F.3d 1095 (9th Cir. 1997).

Moreover, during those thirty years, numerous lower federal courts have relied on *Metromedia's* holding dealing with commercial billboards, a sampling of which is: *Clear Channel Outdoor, Inc. v. City*

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[8] 466 U.S. 789, 807, 104 S. Ct. 2118, 2130, 80 L. Ed. 2d 772 (1984) ("We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit. '[The] city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.'").

[9] 512 U.S. 43, 49, 114 S. Ct. 2038, 2042, 129 L. Ed. 2d 36, 43 (1994) ("In *Metromedia*, we reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the city of San Diego in the interest of traffic safety and esthetics. The ordinance generally banned all except those advertising 'on-site' activities. The Court concluded that the city's interest in traffic safety and its esthetic interest in preventing 'visual clutter' could justify a prohibition of offsite commercial billboards even though similar on-site signs were allowed.") (notes omitted).

of L.A., 340 F.3d 810 (9th Cir. 2003); *Onsite Adver. Servs. LLC v. City of Seattle*, 36 Fed. Appx. 332 (2002); *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996); *Ackerley Communications*, 108 F.3d 1095); *Advanced Outdoor v. County of San Diego*, 64 F.3d 666 (9th Cir. 1995); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993); *National Adver. Co. v. Orange*, 861 F.2d 246 (9th Cir. 1988).

The state courts too have relied on *Metromedia*, including: *Ex parte Walter*, 829 So. 2d 186 (Ala. 2002); *City of Salinas v. Ryan Outdoor Adver., Inc.*, 189 Cal. App. 3d 416 (Cal. 1987); *Burns v. Barrett*, 561 A.2d 1378 (Conn. 1989); *City of Sunrise v. D.C.A. Homes, Inc.*, 421 So. 2d 1084 (Fla. Dist. Ct. App. 1982); *City of Lake Wales v. Lamar Adver. Ass'n*, 414 So. 2d 1030 (Fla. 1982); *Cafe Erotica v. Florida Dep't of Transp.*, 830 So. 2d 181 (Fla. Dist. Ct. App. 2002); *Dep't of Transp. v. Shiflett*, 310 S.E.2d 509 (Ga. 1984); *National Adver. Co. v. Vill. of Downers Grove*, 561 N.E.2d 1300 (Ill. App. Ct. 1990); *Immaculate Conception Corp. v. Iowa Dep't of Transp.*, 656 N.W.2d 513 (Iowa 2003); *Maurice Callahan & Sons, Inc. v. Outdoor Adver. Bd.*, 427 N.E.2d 25 (Mass. App. Ct. 1981); *State v. Hopf*, 323 N.W.2d 746 (Minn. 1982); *City of Cottage Grove v. Ott*, 395 N.W.2d 111 (Minn. Ct. App. 1986); *Gannett Outdoor Co. of Michigan v. City of Troy*, 409 N.W.2d 719 (Mich. Ct. App. 1986); *City of Rochester Hills v. Schulz*, 592 N.W.2d 69 (Mich. 1999); *Town of Carmel v. Suburban Outdoor Adver. Co.*, 514 N.Y.S.2d 387 (App. Div. 1987); *Penn Adver.*,

Inc. v. City of Buffalo, 613 N.Y.S.2d 84, 86 (App. Div. 1994); *R. O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 388 (N.C. Ct. App. 1982); *Genesis Outdoor Inc. v. Vill. of Cuyahoga Heights*, 2002 Ohio 2141 (Ct. App. 2002); *Atlantic Ref. and Mktg. Corp. v. Bd. of Comm'rs of York Tw.*, 608 A.2d 592 (Pa. Commw. Ct. 1992); *Kasha v. Dep't of Transp.*, 782 A.2d 15 (Pa. Commw. Ct. 2001); *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49 (Tenn. Ct. App. 2004); *Eller Media Co. v. City of Houston*, 101 S.W.3d 668 (Tex. App. 2003); *Town of New Mkt. v. Battlefield Enters., Inc.*, 8 Va. Cir. 96 (Va. Cir. Ct. 1984).

Nor has *Metromedia* been overruled by the various non-billboard *Central Hudson* cases relied upon by Metro Lights.[10] (Petition at 18-21). *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999),[11] is distinguishable because it dealt with a

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[10] The Ninth Circuit correctly recognized that those other Supreme Court underinclusivity cases do not deal with the "law of billboards" which remains the exclusive province of *Metromedia*. *Metro Lights*, 551 F.3d at 911. Metro Lights argues that the Ninth Circuit applied an "entirely different analytical framework" than those other underinclusivity cases. (Petition at 20 n.2). Untrue. All of the cases, including *Metromedia* and *Metro Lights*, use the same analytical framework consisting of the four-part *Central Hudson* test.

[11] The *Greater New Orleans* decision was cast in the mold of an earlier case, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) that involved a federal law that prohibited beer labels from showing alcohol content but allowed advertisements for beer to show such information and

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statutory scheme that had virtually no chance of furthering the government's objective of reducing the number of compulsive gamblers – in the Court's view the government's simultaneous encouragement of advertising for Indian casinos while banning advertising for private casinos simply canceled each other out and re-directed gamblers from one venue to the other. By contrast, here the de facto exception for bus shelter signs does *not* cause a ban to lose virtually all effectiveness in furthering the goals of improving aesthetics and traffic safety. *Metro Lights,* 551 F.3d at 905-06.

City of Cincinnati v. Discovery Network, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993), is distinguishable because there this Court found that the key feature of the statutory scheme, which was a distinction between commercial and noncommercial newsracks, lacked any logical connection to furthering Cincinnati's interest in aesthetics and sidewalk safety, and thus the statutory scheme failed the *Central Hudson* test. By contrast, here, the perceived exception is a limited and controlled series of transit furniture signs limited to public rights-of-way that will not undermine the ban's furtherance of Los Angeles' goals and for that reason Los Angeles'

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allowed wine labels to include it. That law worked at such cross purposes that, like the law in *Greater New Orleans*, it had little or no chance of furthering the government's objectives behind the law, and on that basis can also be distinguished from Los Angeles' ban.

statutory scheme satisfies the *Central Hudson* test. *Metro Lights*, 551 F.3d at 905.[12] *See also Ackerley Communications of the Northwest Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) (pointing out that this Court has never said that *Central Hudson* cases outside of the billboard arena have undermined *Metromedia* and that this Court has continued to rely on *Metromedia*.).

Metro Lights suggests that the Ninth Circuit's naked observation that there "may seem to be some tension" between this Court's more recent cases applying the *Central Hudson* test and *Metromedia* is an open invitation to this Court to revisit that case. (Petition at 19); *id.* at 908. Not so. The Ninth Circuit's observation should not be taken for more than it is. The observation simply recognizes that the ultimate holdings in *Metromedia* and those other cases differed. The analysis under the third part of the *Central Hudson* test has always been fluid, fact-specific, and dependent on degree. Just because this Court has seen fit to strike down a few regulatory

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[12] Metro Lights also argues, based on discussion in *Discovery Network*, that where governmental regulation does not relate to the commercial nature of commercial speech the regulation should be subject to review under standards applicable to "fully protected speech." (Petition at 18-19). This argument lacks merit because there is no practical way to make this distinction. Any regulation imposed on a sign structure used to display commercial messages necessarily affects the commercial content of those messages. Therefore, the standard of review for regulations of commercial speech should continue to apply.

schemes as ultimately ineffectual does not indicate abandonment of a nuanced analysis that allows courts to in some cases uphold regulations of commercial speech and in other cases strike it down.

To bolster its request to revisit *Metromedia*, Metro Lights portrays the case as failing to produce any binding law to guide subsequent courts. (Petition at 11, 15). This portrayal is flawed. The *Metromedia* Court *did* produce binding law. Pertinent to this litigation, a majority of that Court, comprised of the four-Justice plurality and Justice Stevens's dissent, expressly ruled that a city may impose a city-wide ban on all new offsite commercial signs, and that such a ban may exempt onsite and other specified types of signs, all without violating the First Amendment.[13] It was this ruling that the Ninth Circuit panel relied on in *Metro Lights*.

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[13] *Id.* at 512: "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted. . . . In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of Central Hudson, supra." (plurality opinion by Justice White and joined by Justices Stewart, Marshall, and Powell); *id.* at 541: "The plurality first holds that a total prohibition of the use of 'outdoor advertising display signs' for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is permissible. I agree with the conclusion that the constitutionality of this prohibition is not undercut by the distinction San Diego has drawn between onsite and offsite commercial signs . . . and I therefore join Parts I through IV of JUSTICE WHITE'S opinion." (Stevens, J., dissenting). While Chief Justice Burger and Justice Rehnquist, who each dissented,

(Continued on following page)

To divert this Court's attention from the central issue in this case – which is whether Los Angeles' ban on offsite signs satisfies *Central Hudson's* direct advancement element – Metro Lights asserts that the economic motive for the City has not been properly considered by this Court (Petition at 26) and amicus joins the fray. (Brief of Amici Curiae Atlantic Outdoor Advertising, Inc. and Willow Media, LLC at 9).

This is untrue. The existing standard, the *Central Hudson* test, already protects against such potential self-interest. If a sign company suspects that the true and sole purpose of a ban is to benefit the city's economic interests, and not to improve aesthetics and traffic safety, the sign company is always free to argue that the second element of the *Central Hudson* test (which requires that there be a substantial governmental purpose behind the ban) has not been satisfied and submit supporting evidence to that effect.

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did not expressly join in Part VI of the plurality's opinion as did Justice Stevens, they did not disagree with it, thereby impliedly agreeing with it. *City of Ladue v. Gilleo*, 512 U.S. 43, 49 n.8, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) ("Five Members of the Court joined Part IV of Justice White's opinion, which approved of the city's decision to prohibit off-site commercial billboards while permitting on-site billboards. None of the three dissenters disagreed with Part IV. *See* 453 U.S. at 541 (Stevens, J., dissenting in part) (expressly joining Part IV); *id.* at 564-565 (Burger, C. J., dissenting); *id.* at 570 (Rehnquist, J., dissenting)").

As explained in the earlier "Opinions Below" section, Metro Lights never submitted evidence showing that the sole motivation for the City's enactment of the ban was economic, nor did the district court make a finding to this effect.

Amicus also tries to analogize the City's ban to case law where courts, on due process grounds, have kept adjudicatory bodies from deciding matters in which they have a financial stake. (Amicus brief at 8-9). This comparison is inapt. The due process clause, which provides protection against the government depriving an individual of its property rights, does not apply to legislative action, the reason being that legislation applies broadly to all future cases and does not single out any one person's property rights. *Horn v. County of Ventura*, 24 Cal. 3d 605, 616, 156 Cal. Rptr. 718 (1979). For that reason, the due process bias cases cited by amicus have no application to the City's ban, which is a pure legislative act.

For all these reasons, there is no need to revisit or overturn *Metromedia*.

C. The fact that the ban, as a matter of law, does not apply to signs on public property provides an alternative rationale for the Ninth Circuit's decision.

Another reason for denying the petition is the availability of an alternative ground to uphold the

Ninth Circuit's ruling.[14] *See Sanson Hosiery Mills v. NLRB*, 344 U.S. 863, 735 S. Ct. 103, 97 L. Ed. 669 (1952). This alternative rationale relies on the inherent distinction between public and private property, and the different roles government plays with respect to each.

With respect to publicly-owned streets and sidewalks, the government acts in the roles of owner and caretaker, and in those roles must carefully balance a number of competing interests, including use of the streets for travel and free speech. *See, e.g., Sanctity of Human Life Network v. Cal. Highway Patrol*, 105 Cal. App. 4th 858, 870, 129 Cal. Rptr. 2d 708, 716 (2003) (state can restrict citizens from holding signs

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[14] There is another alternative ground for upholding the Ninth Circuit's ruling, but based on an equal protection rather than First Amendment analysis. In situations such as this that involve both free speech and differential treatment among classes of speakers, some courts have concluded that the more appropriate analysis is under equal protection rather than the First Amendment. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). Under facts analogous to those here, equal protection principles have been applied where a city-wide ban on billboards exempted advertising signs on a city-owned sports stadium. The court applied a rational basis equal protection test after noting that there was no fundamental free speech right involved, which may have been because the speech was purely commercial in nature. After concluding that the regulatory scheme passed the rational basis test because the exemption for the signs on the sports stadium was discrete and reasonable under the circumstances, the court upheld the ban. *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 351 F. Supp. 2d 420, 425 (D. Md. 2005).

over freeway overpasses during rush hour in order to preserve "free flow of traffic"). With respect to private property, the government acts as regulator under authority of its police power. *See, e.g., G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006).

These different roles have led to two lines of First Amendment jurisprudence. Where government is acting in its role as owner of public property, the case law focuses on whether the public property is a public forum or not. Bus shelters are not. *See, e.g., Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1278-79 (11th Cir. 2003). Further, it is a long standing principle that when government acts as a proprietor to manage its internal operations, as opposed to exercising its power as regulator, those proprietary actions are subject to a lower level of First Amendment scrutiny. *United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 3119, 111 L. Ed. 2d 571, 580 (1990); *Children of the Rosary v. City of Phoenix*, 526 U.S. 1131, 119 S. Ct. 1804, 143 L. Ed. 2d 1008 (1999). By contrast, where government is acting in its role as regulator of private property, the government's actions are subject to a higher level of scrutiny. This review takes into account such factors as whether or not the restrictions are content-based and whether the restrictions are limited to time, place and manner considerations. *See, e.g., Metromedia*, 453 U.S. 490 (1981).

Because these different lines of First Amendment jurisprudence arise out of the fundamental distinction

between public and private property, that distinction cannot be ignored. The significance of this distinction has been most recently affirmed by this Court in *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). In that case, this Court found that a city that was already displaying a monument to the Ten Commandments in a city park had no obligation under the First Amendment to provide space for other groups' religious monuments. In so finding, the Court explained that the government's own expressive activity is not subject to the First Amendment, and that only the government's regulation of private speech is. *Id.* at 1130 ("*The Free Speech Clause* restricts government regulation of private speech; it does not regulate government speech.").

Applying this doctrine here[15] means that Los Angeles' own bus shelter signs, which are governmental speech, will not be subject to the First Amendment. In fact, this is already reflected in the fact that signs in the public right-of-way are expressly outside the scope of Los Angeles' ban.[16] Therefore, the bus

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[15] There is even greater reason to apply the doctrine here than in *Summum* because, unlike in that case, the facts here deal exclusively with commercial speech, which this Court has deemed not deserving of as high a level of protection as political and other noncommercial speech. *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 779-80, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

[16] This fact is reflected in LAMC § 91.101.4 (Building Code, of which Sign Ordinance is a part, applies only to private

(Continued on following page)

shelter signs should not be considered at all when analyzing the constitutionality of the ban.

Viewed in this light, the ban is a flat ban because it applies equally to all billboards on private property. A flat ban easily satisfies the *Central Hudson* test and, in particular, the third element of that test that requires that the regulation "directly advance" the government's stated objectives. *Metro Lights*, 551 F.3d at 909 ("Indeed, its counsel, at oral argument, conceded that *Metromedia* 'probably would' control without the SFA [Street Furniture Agreement].").

This alternative rationale thus amply supports the Ninth Circuit's decision, making it unnecessary for this Court to reach the legal issues raised by the petition.

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property and expressly excludes structures in public right-of-way). (Appendix, App. 17).

CONCLUSION

For all these reasons, the Court should deny the petition.

Dated: November 16, 2009

Respectfully submitted,

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ORDINANCE NO. 173681

An ordinance imposing interim regulations on the issuance of building permits for Off-Site signs.

WHEREAS, on October 24, 2000, the City Council adopted a motion to create a Sign Task Force to undertake a comprehensive review of the existing sign ordinance, and formulate recommendations for updating the ordinance; and

WHEREAS, the City's current sign ordinance has been in effect for many years, and in spite of periodic revisions, there have been changes and advancements in the sign industry that were not anticipated and are still not addressed in the ordinance; and

WHEREAS, several motion have recently been introduced requesting Interim Control Ordinances to prohibit the placement of various new Off-Site signs; and

WHEREAS, without the Ordinance, the proliferation of new billboards is likely to negate the effectiveness of updated ordinance standards; and

WHEREAS, the proliferation of billboards (Off-Site signs) in the City of Los Angeles has served as a blighting influence in many areas of the City and has adversely and significantly affected the visual quality of areas through out the City; and

WHEREAS, it is to the benefit of the general welfare of the City that this proliferation of billboards

be curbed or eliminated therefore minimizing to the extent feasible visual blight upon the City's neighborhoods and blighted communities; and

WHEREAS, the City is preparing a citywide ordinance which would ban the construction of new billboards in many areas of the City and provide for removal of a large number of billboards which is conceptually supported by the public, the City Council and the sign industry; and

WHEREAS, City staff, working with representatives of the sign industry in developing the proposed ordinance, contemplate that the development of a permanent ordinance will take about 180 days from drafting to full enactment by the City; and

WHEREAS, there already have been a significant number of applications for new billboards filled with the Department of Building in Safety which, when approved according to existing law, would circumvent and defeat the purposes of the proposed legislation and the clear will of the people; and

WHEREAS, it is necessary to halt the continued proliferation of new billboards until permanent regulations can be enacted and put into place so the adverse affects of these new signs can be minimized or eliminated; and

WHEREAS, the City Council has determined that in order to address these concerns, it is necessary and appropriate that an interim control ordinance be enacted prohibiting the issuance of new

permits for billboards until such time as a new ordinance can be developed, fully considered by the affected parties and the public, heard and or considered by the City Planning Commission, the City Council and the Mayor; and

WHEREAS, Objective 5.5 of the Citywide General Plan Framework states "Enhance the livability of all neighborhoods by upgrading the quality of development and improving the quality of the public realm"; and

WHEREAS, Goal 5A of the Citywide General Plan Framework states "A liveable City for existing and future residents and one that is attractive to future investment"; and

WHEREAS, Policy 5.8.4 of the Citywide General Plan Framework states "Encourage that signage be designed to be integrated with the architectural character of the buildings and convey a visually attractive character."

NOW THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. DEFINITIONS. Words and phrases shall be construed as defined in Sections 12.03 and 91.6203 of the Los Angeles Municipal Code, if defined therein.

Sec. 2. PROHIBITION. Notwithstanding any provisions of the Los Angeles Municipal Code to the

contrary, for a period of 180 days from the effective date of this Ordinance, with two possible 180-day extensions, or until a permanent ordinance is adopted which amends the citywide provisions governing Off-Site signs, whichever occurs first:

No building permit for either the construction or placement of any new Off-Site sign or an increase in square footage or dimensions of an existing Off-Site sign shall be issued.

Sec. 3. EXCEPTIONS. The prohibition specified in Section 2 of this Ordinance shall not apply to the issuance of any building permit for any Off-Site sign:

1. In order to comply with an order issued by the Department of Building and Safety to repair, remove or demolish an unsafe or a substandard condition with respect to any Off-Site sign.

2. In order to replace any Off-Site sign damaged as a result of fire, earthquake, or other natural disaster, provided that the replacement is not prohibited by any provision of the Los Angeles Municipal Code.

Sec. 4. EXTENSION OF REGULATIONS. The City Council may, by resolution, extend the provisions of this Ordinance for two additional periods, not to exceed 180 days each, so long as the City Council makes the following finding: That appropriate City agencies and officials are exercising due diligence to

assure that the subject ordinance is being expeditiously processed.

Sec. 5. HARDSHIP EXEMPTIONS. The City Council, acting in its legislative capacity and by resolution, may grant hardship exemptions from any or all of the provisions of this Ordinance in cases of extreme hardship duly established to the satisfaction of the City Council.

An application for hardship exemption shall be filed with the City Clerk, on forms provided by the Department of City Planning.

Sec. 6. SEVERABILITY. If any provision of this Ordinance is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect the remaining provisions of this Ordinance which can be implemented without the invalid provision and, to this end, the provisions of this Ordinance are declared to be severable.

Sec. 7. APPLICABILITY OF THE ZONING CODE. The regulations of this Ordinance are in addition to those set forth in the planning and zoning provisions of Chapter 1 of the Los Angeles Municipal Code and any other ordinances adopted by the City Council and do not contain any rights otherwise granted under the provisions and procedures contained in that Chapter or other ordinance.

Sec. 8. URGENCY CLAUSE. The City Council finds and declares that this Ordinance is required for

the immediate preservation of the public peace, health and safety for the following reasons. This Ordinance is necessary to prevent irreversible development from occurring pending adoption of a permanent ordinance by preventing the construction and placement of signage that would add to visual blight in the City and possibly undermine the recommendations of the Sign Task Force. In addition, this ordinance is needed to protect the health and safety of citizens of Los Angeles by limiting the potential for traffic conflicts caused by motorists who are distracted by billboards on heavily traveled thoroughfares. Therefore, this Ordinance shall become effective upon publication pursuant to Los Angeles City Charter Section 253.

Sec. 9. The City Clerk shall certify to the passage of this ordinance and cause it to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, by a vote of **not less than three-fourths** of all its members, at its meeting of DEC 01 2000.

J. MICHAEL CAREY, City Clerk

By /s/ Konrad Carter
Deputy

Approved DEC 12 2000

/s/ [Illegible]
Mayor

Approved as to Form
and Legality

James K. Hahn,
City Attorney

Pursuant to Charter Section 559, I approve this ordinance and recommend its adoption on behalf of the City Planning Commission . . . . . November, 2000 see attached report.

/s/ Con Howe
Con Howe
Director of Planning

By
Sharon Siedorf Cardenas
Assistant City Attorney

File No. CF00-2078

ORDINANCE NO. 174547

An ordinance amending Sections 12.21 and 91.6205.11 of the Los Angeles Municipal Code relating to signs.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Subdivision 7 of Subsection A of Section 12.21 of the Los Angeles Municipal Code is amended as follows:

7. No nameplate, sign or advertising matter of any kind shall be placed or maintained on any lot in any zone except in accordance with the following regulations:

(a) All nameplates, signs and advertising matter on a lot in an "A" or "R" Zone shall pertain to a permitted use (except that no signs shall be permitted to identify a home occupation) or indicate the name of the occupant and shall be located on the same lot with that use;

(b) No nameplate, sign or advertising matter, which is attached to a building on a lot in an "A" or "R" Zone, may project above the roof ridge or parapet wall (whichever is the higher) of the building;

(c) No illuminated nameplate, identification sign or advertising matter, which is permitted by this subdivision, may be of the flashing, moving or animated type;

(d) There may be only one unlighted nameplate for each dwelling unit on a lot in an "A" or "R" Zone indicating the name of the occupant, (except that no signs shall be permitted to identify a home occupation), and no nameplate may exceed three square feet in area in an "A" Zone, nor exceed one and one-half square feet in area in an "R" Zone;

(e) There may be one or more unlighted signs pertaining to the sale of farm products raised or produced on the premises, but the total area of all these signs shall not exceed 20 square feet on any lot in an "A" Zone, nor exceed 12 feet on any lot in an "R" Zone;

(f) There may be one or more unlighted signs pertaining to the prospective rental or sale of the property, but the total area of all these signs shall not exceed 20 square feet on any lot in an "A" Zone, nor exceed 12 square feet on any lot in an "R" Zone;

(g) There may be one identification sign for each farm, ranch, estate or building other than a dwelling in an "A" Zone, but that identification sign may not exceed 20 square feet in area;

(h) There may be one or more signs identifying the buildings or permitted use (except that no signs shall be permitted to identify a home occupation) on any lot in any "R" Zone, but no one sign may have a surface area which exceeds 20 square feet, nor shall

the total surface area of all these signs exceed 30 square feet;

(i) There may be one church bulletin board, not exceeding 18 square feet in area, on any lot in any "A" or "R" Zone;

(j) There may be one or more signs, warning against trespassing, on any lot in an "A" Zone, but no one sign shall exceed three square feet in area.

(k) Temporary Subdivision Directional Signs. Notwithstanding any other provision of this article, a Zoning Administrator may approve the use of any property in an "A" or "R" Zone for the erection and maintenance of temporary unlighted subdivision directional signs, which are neither reflective nor fluorescent, if he or she finds that the location of the signs is proper in relation to uses of adjacent property and that the use will not be materially detrimental to the property of other persons located in that vicinity. This approval shall be subject to the following regulations:

(1) An application shall be filed in the Office of Zoning Administration upon a form and accompanied by the data and information as has been prescribed by the Office. Each application shall be consented to and acknowledged by the owner or lessee of each parcel of property upon which a sign is to erected. Only one application need be filed for all temporary, unlighted, subdivision directional signs

relating to a single subdivision separately numbered and recorded by the Los Angeles County Recorder. The manner of installation and conditions regulating number, size and type of signs shall be determined and approved by a Zoning Administrator. To the extent possible, he or she shall make available a list or explanation of those installation features and conditions that are usually required.

(2) An approval to erect and maintain signs pursuant to this paragraph shall be valid for one year. If, after one year, ¾ of the dwelling units or lots have not been sold or leased for the first time, approval for retaining the directional signs for not more than an additional one-year period may be granted by a Zoning Administrator.

(3) No sign erected pursuant to this paragraph shall exceed 12 square feet in area.

(4) One temporary, unlighted, subdivision directional sign may be approved for location adjacent to each street which constitutes a separate and distinct direction on the route from a major or secondary highway to a subdivision site. Where there are two or more major or secondary highways from which there are routes to a subdivision

site, signs may be approved only along two routes.

(5) The erection and maintenance of temporary, unlighted, subdivision directional signs may be approved only on vacant property; however, if a Zoning Administrator determines that vacant property is not available in locations where provisions for travel directions are essential, he or she may approve developed property for the location of signs.

(6) Signs may not be located within the public right-of-way of any highway, street, alley, or on any other public right-of-way.

(7) All signs permitted by this paragraph shall be removed within five days after the expiration of the authorized time period. Each application shall contain a statement signed by the applicant, the owner of the signs, and the owner or lessee of the property upon which the signs are to be placed, agreeing that if the signs are not removed as required above, they may be confiscated, removed and destroyed by the City without further notice. Prior to the erection of any signs authorized pursuant to any single application, the applicant shall deposit $100 with the Department of Building and Safety for the purposes of defraying any expense

incurred by the City in the removal of the signs. This money shall be refunded on the expiration of the prescribed time period if all of the signs have been removed by the applicant, the owner of the signs, or the owner and the lessee of the property where the signs are placed.

(8) Any sign erected pursuant to these regulations may be used only for the purpose of providing necessary travel direction to a subdivision development located in the City of Los Angeles, and must include the name of the owner, the City Planning Department file number, and the expiration date of the approval period. The sign may contain the name of the land development project to which it pertains, including a characteristic trademark or other identifying insignia. The content of each sign shall be subject to approval by a Zoning Administrator.

(9) The approval of temporary subdivision directional signs pursuant to these regulations does not release the applicant from the responsibilities of complying with any provisions of the Los Angeles Municipal Code pertaining to building permit requirements or any other provisions of the Code regulating signs.

(10) Appeals. Appeals from a determination by a Zoning Administrator may be taken to the Area Planning

Commission in the manner prescribed in Section 12.24 l.

(l) Off-site signs. No off-site sign shall be allowed in any zone, except when off-site signs are specifically permitted pursuant to a legally adopted specific plan, supplemental use district or an approved development agreement. Further, that legally permitted existing signs shall not be altered or enlarged.

Sec. 2. Section 91.6205.11 of the Los Angeles Municipal Code is hereby amended by adding a new subsection 11 to read:

11. Are off-site signs, except when off-site signs are specifically permitted pursuant to a variance, legally adopted specific plan, supplemental use district or an approved development agreement. This shall also apply to alterations or enlargements of legally existing off-site signs.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located in the Main Street lobby to the City Hall; one copy on the bulletin board located at the ground level at the Los Angeles Street entrance to the Los Angeles Police Department; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of APR 30 2002.

J. MICHAEL CAREY, City Clerk

By /s/ Konrad Carter
Deputy
KONRAD CARTER

Approved MAY 7 2002

/s/ James K. Hahn
Mayor

Approved as to Form and Legality

MAR 29 2002
ROCKARD J. DELGADILLO,
City Attorney

Pursuant to Charter Section 559, I approve this ordinance and recommend its adoption on behalf of the City Planning Commission . . . . . .

March 28, 2002

see attached report.

/s/ Con Howe
Con Howe
Director of Planning

By Sharon Siedorf Cardenas
SHARON SIEDORF CARDENAS
Assistant City Attorney

File Nos. C.F. 00-2254 and 02-0138; CPC 2002-461 CA

ARTICLE 1, DIVISION 1
ADMINISTRATION

Section

91.101 Title, Purpose, and Scope.
91.102 Unsafe Buildings or Structures.
91.103 Violations.
91.104 Organization and Enforcement.
91.105 Appeals.
91.106 Permits.
91.107 Fees.
91.108 Inspection.
91.109 Certificate of Occupancy.
91.110 Responsibility of Permittee.
91.111 Code Revision.
91.112 Grading Certificate.

SEC. 91.101. TITLE, PURPOSE, AND SCOPE.

91.101.1. Title. This article shall be known as the **Los Angeles Building Code** or **Building Code** or **LABC**, a portion of the Los Angeles Municipal Code (LAMC), and wherever the word **Code** is used in this article it shall mean the **Los Angeles Building Code**. The Los Angeles Building Code adopts by reference portions of the California Building Code (CBC). **(Amended by Ord. No. 180,619, Eff. 5/12/09.)**

91.101.2. Purpose. The purpose of this article is to safeguard life, limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and

structures erected or to be erected within the city, and by regulating certain grading operations within the city.

91.101.3. Reserved.

91.101.4. Scope. (Amended by Ord. No. 180,619, Eff. 5/12/09.) The provisions of this Code shall apply to the construction, alteration, moving, demolition, repair, maintenance and use of any building or structure within this jurisdiction; except work located primarily in a public way, public utility towers and poles, mechanical equipment not specifically regulated in this Code, and hydraulic flood control structures.

For additions, alterations, moving and maintenance of buildings and structures, see Division 34. For temporary buildings and structures, see CBC Section 3103.

Where, in any specific case, different sections of this Code specify different materials, methods of construction or other requirements, the most restrictive shall govern. Where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable.

The codes and standards referenced in this Code shall be considered part of the requirements of this Code to the prescribed extent of each reference. Where differences occur between provisions of this Code and referenced codes and standards, the provisions of this Code shall apply.

Wherever in this Code reference is made to an appendix, the provisions in the appendix shall not apply unless specifically adopted.

The metric conversions are provided in parenthesis following the English units. Where industry has made metric conversions available, the conversions conform to current industry standards. Formulas are also provided with metric equivalents. Metric equivalent formulas immediately follow the English formula and are denoted by "For SI" preceding the metric equivalent. Some formulas do not use dimensions and, thus, are not provided with a metric equivalent. Multiplying conversion factors have been provided for formulas where metric forms were unavailable. Tables are provided with multiplying conversion factors in subheadings for each tabulated units measurement.

91.101.5. Work Not in Scope. The provisions of this Code shall not apply to any of the following:

1. A building accessory to a dwelling and not located in Fire District No. 1 provided the building is not more than 64 square feet in area or 8 feet in height and does not contain any heating, plumbing or electrical installation, and is located as permitted by the Los Angeles Zoning Code. **(Amended by Ord. No. 180,619, Eff. 5/12/09.)**